Supreme Court, U.S.
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No. 88-604

In The
Supreme Court of the United States
October Term, 1988

VICKI FROST,

Petitioner,

v.

HAWKINS COUNTY BOARD OF EDUCATION, JEAN PRICE, JOE ASHBROOK, BILL B. SNODGRASS, CITY OF CHURCH HILL, TENNESSEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT HAWKINS COUNTY BOARD OF EDUCATION IN OPPOSITION

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT HAWKINS COUNTY BOARD OF EDUCATION IN OPPOSITION

Respondent Hawkins County Board of Education respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit, which is reported at 851 F.2d 822.

STATEMENT OF THE CASE

Petitioner's statement of the facts is inaccurate, misleading and deals with matters not relevant to this case, necessitating a restatement of the pertinent facts considered below.

This is a civil rights action based on 42 U.S.C. § 1983 in which Vicki Frost alleged violations of her First Amendment free speech rights and her Fourteenth Amendment rights. She claimed prior restraint on expression of her ideas on the advisability of using new reading textbooks in the Hawkins County public schools, denial of physical custody of her daughter without due process, false arrest and imprisonment and malicious prosecution. She sued the Hawkins County Board of Education; Bill Snodgrass, Superintendent of Schools; Jean Price, Principal of Church Hill Elementary School; Joe Ashbrook, Chief of Police for Church Hill, Tennessee and the City of Church Hill. Although she objected to the textbooks on religious grounds, she did not claim interference with her right to the free exercise of religion as guaranteed by the First Amendment. (2nd Amended Complaint, R.12; Pretrial Order R.24).[1]

Mrs. Frost did, however, join other parents and children in a different suit against the Hawkins County public schools and school officials (including Jean Price and Bill Snodgrass) asserting that exposure of the plaintiff-students to objectionable material in the reading books violated their constitutional right to freely exercise their re-

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[1] "R" references are to docket entry numbers in the District Court Record and "TR" references are to pages of the trial transcript.

ligion. They sought damages, exemption from using the books and alternative reading instruction. Petitioner and the other plaintiffs prevailed in the trial court, but the Sixth Circuit Court of Appeals reversed and dismissed. This Court declined to hear the case. *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986) *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S.Ct. 1029 (1988).

When the 1983 school year began there was a new series of coordinated reading books published by Holt, Rinehart and Winston ("the Holt readers") to be used for grades K-8 of the Hawkins County, Tennessee school system. The series was approved by the State Department of Education, selected by a committee of Hawkins County teachers from among several competing series and approved by the Hawkins County Board of Education ("the Board").

Mrs. Frost had three children enrolled in the school system, two in middle school and a daughter, Sarah, in the second grade at the Church Hill Elementary School. Mrs. Frost became concerned about materials in the Holt readers and concluded that she objected to the complete series because it contained stories dealing with themes which she considered repugnant to her religious beliefs: e.g. secular humanism, situation ethics, mental telepathy, evolution, non-Christian religions, feminism, inappropriate roles for the sexes, disobedience to parents and pacifism. (TR C-11, 13, 14, 48). Petitioner determined to make the public aware of her objections to the textbooks. She helped organize and was active in an organization known as Citizens Organized for Better Schools, which objected

to the textbooks. She voiced her objections to the textbooks at open meetings of the Board and spoke to the news media about her concerns. (TR B-26, 27, 32, 33, 35).

Petitioner's children, and those of other similarly concerned parents, at the Church Hill Middle School were allowed for a while to use an older reading series, rather than the Holt readers. That arrangement continued until the Board passed a resolution on November 10, 1983 requiring all students to use only those textbooks approved by the Board. Petitioner refused to allow her children at the Middle School to participate in class where the objectionable books were in use and they were suspended twice for refusing to participate in reading class. (TR A-19, 20).

Mrs. Frost complained about Sarah's textbook at the elementary school and her teacher and Mrs. Price, the Principal, agreed as a temporary measure to excuse Sarah from reading the book. Mrs. Frost talked with Mrs. Price on several occasions and explained in detail her objections not only to Sarah's book but the other books in the series. Mrs. Price attempted to determine which stories in the second grade book were acceptable to Petitioner and all stories seemed to have something wrong with them. (TR C-16). Mrs. Price explained that oral reading and comprehension were graded separately and that Sarah would receive a failing grade in oral reading, if she did not read the approved textbook.

Mrs. Frost informed Mrs. Price that she had determined to remove Sarah from class during the reading period. She requested to be allowed to take Sarah to the library or cafeteria and work with her during reading

class. Mrs. Price, who felt that was against Board policy and unwise, disallowed the request. (TR F-44, 45). Mrs. Price explained that Petitioner had the right to take Sarah out of class and that Sarah would not be expelled or suspended if taken from class by her mother. However, Mrs. Price informed Petitioner that repeated absences from class would be reported to the County's attendance supervisor. (TR C-22).

On Monday, November 21, Petitioner came to the school to remove Sarah from class. While there she met with Mrs. Price, a member of the Board, the elementary supervisor for the school system and Sarah's teacher. After a short discussion Mrs. Frost removed Sarah from class and took her from the school grounds without objection or hindrance. (TR A-34, C-27). Sarah later returned to class and completed the day without incident.

The next day Petitioner returned to the school, talked with Mrs. Price about the requirement that Sarah use the approved text and participate in oral reading. Petitioner again requested to take Sarah to the library or cafeteria to work with her during the reading class and that request was denied. Mrs. Frost then took Sarah from the reading class and sat with her in an automobile in the school parking lot. Mrs. Price felt that conduct violated Board policy and consulted the School Superintendent who suggested that she have the local police ask Mrs. Frost to leave the parking lot. (TR C-27, 32). Mrs. Price contacted the local police department and police chief Joe Ashbrook responded. She explained the situation to him, he asked Petitioner to leave and she did. Petitioner later dropped Sarah off at the school and she returned to class. (TR C-32, 36, 48).

On November 23, 1983 Petitioner returned to the school and was again told by Mrs. Price that she had the right to take Sarah from class, but that she would not be permitted to take Sarah anywhere on the premises to instruct her in reading. (TR F-38). Mrs. Frost then called the Church Hill Police Department and asked that a police officer be sent to the school. (TR A-52). She stated she was going to get Sarah out of reading class and left. (TR A-53). Mrs. Price made no objection. (TR F-38). Mrs. Frost returned without Sarah and stated that reading had not begun. (TR A-53). Shortly thereafter policeman Ashbrook arrived.

After Ashbrook arrived Mrs. Frost presented Mrs. Price with two letters indicating that she was taking Sarah out of the Holt basic reading program because of dictates of conscience and requesting to sit in the lunch room with her acting as an aide to the teacher until reading class was completed. (TR A-55, F-39). An argument ensued about the contents of the letter and Petitioner's position on the use of the textbooks. Mrs. Frost stated that she wasn't going to check Sarah out and that she was not going to leave and stated several times that Mrs. Price would have to have the policeman arrest her. TR F-39, 40; TR VII-69, 109). Mrs. Price tried to explain to Petitioner why it was not permissible or feasible to have her take Sarah out of the classroom and go to the cafeteria or elsewhere in the school to teach reading. (TR F-40).

Ashbrook asked Mrs. Price for a copy of the statute concerning people improperly on school premises. (T.C.A. § 49-818) TR F-40). Mrs. Price had located the stat-

ute in a volume of the Tennessee Code dealing with the school administration, which she maintained in her office, because she feared that a disruptive situation might develop and she wanted to know what her rights as a principal were. (TR F-80, 81). She had previously discussed the provisions of the statute with Mrs. Frost, (TR C-48), and had mentioned the statute to Officer Ashbrook when he had been at the school the day before. (TR F-49). When Petitioner heard the statute mentioned she protested that she had a right to be on school property and that she was not breaking the law. (TR A-57). Mrs. Price explained that she did have a right as a parent to be there as long as she had lawful and valid business, but that she no longer had valid business and that she must leave. Mrs. Frost refused to leave. (TR F-40, 41).

Officer Ashbrook then read T.C.A. § 49-818 to Mrs. Frost and asked her to leave. When she refused to leave, she was placed under arrest, (TR F-41), and taken to the county jail, where she was processed and placed in a cell. She remained in jail for about two hours and was released on her own recognizance.

Petitioner was charged with violation of two Tennessee statutes dealing with persons on school premises (18a and 19a).[2] At a preliminary hearing both charges were dismissed. No one connected with the school system testified at the preliminary hearing. (R.86). No one connected with the school system urged the District Attorney or his assistant to prosecute the case in any particular

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[2] References to pages followed by "a" are to the Appendix to the Petition for Certiorari.

manner or had any contact with the Judge about how the case should be handled. (TR D-79, E-22, 23).

On December 14, 1983, Petitioner enrolled all her children in a private, church affiliated school and she has not attempted to re-enroll them in the Hawkins County school system.

The Pretrial Order filed July 12, 1985, delineated Petitioner's claim:

> II. *GENERAL NATURE OF THE CLAIMS OF THE PARTIES:* (a) The plaintiff, Vickie Frost, alleges . . . the defendants, acting under color of law, did knowingly and willfully conspire with each other, and others, and did aid and assist each other for the purpose of imposing a prior restraint upon plaintiff, through a policy of using the City's police department to threaten and intimidate plaintiff, and others similarly situated, to prevent her from expressing in a lawful, but effective, time, place and manner, ideas relative to the advisability and wisdom of using certain textbooks . . . to teach public school, thereby, depriving her of her First Amendment right of freedom of speech. . . .
>
> The plaintiff also alleges that the defendants deprived her of life, liberty and/or property without due process of law in violation of the Fourteenth Amendment. . . . More specifically, plaintiff claims (1) that . . . the defendants Board of Education, Price, and Snodgrass, through implementation of the Board's official policy, did knowingly deprive plaintiff of the physical custody of her child, Sarah, without due process of law, . . . (2) that on November 23, 1983, the defendants Ashbrook, City of Church Hill, and Price, did knowingly deprive plaintiff of her liberty without due process of law when they arrested her (or caused her to be arrested) without probable cause . . . (3) that on November 23, 1983, defendants Ashbrook and City of Church

> Hill did knowingly deprive plaintiff of her liberty without due process of law when they imprisoned her, or caused her to be incarcerated, . . . and (4) that defendants Ashbrook and the City of Church Hill did knowingly deprive plaintiff of liberty without due process of law when they falsely charged plaintiff with violating specified laws of the State of Tennessee. . . .
>
> Plaintiff seeks the following relief: (1) compensatory and consequential damages . . . (2) punitive and exemplary damages . . . (3) costs and attorneys' fees; and (4) an injunction, enjoining the defendant Board from depriving plaintiff from the custody of her children when she requests such custody in order to prevent the school from teaching her child through the use of materials which violate their religious convictions, enjoining defendants from arresting plaintiff and/or from seeking to have plaintiff arrested when she is present on the school premises as a parent of a child enrolled in the school, and enjoining defendants from conspiring and assisting attempts to impose prior restraint on plaintiff's (or those similarly situated) lawful expression of criticism of the Board and its policies. (R.24).

Mrs. Frost sought no relief for alleged violation of her First Amendment right to free exercise of religion. She sought no injunction requiring an alternative to the Holt readers for her children.

The jury was not charged on the Free Exercise Clause of the First Amendment. The trial court summarized plaintiff's claims as follows:

> She claims, first, that they violated her First Amendment right of free speech and expression by preventing her from removing Sarah from reading classes, and that this act on their part was, in effect, a prior restraint on her free expression of her ideas. She

> claims further that on November 23rd, 1983, they deprived her of her liberty interest in having physical custody of Sarah, without due process of the law, and that they caused her to be arrested, imprisoned, and prosecuted without probable cause, also a violation of her Fourteenth Amendment right to due process of law. (TR IX-82).

Petitioner sought no jury charge dealing with the Free Exercise Clause of the First Amendment of the United States Constitution, and on appeal her counsel admitted she sought no such relief:

> In the *Mozert* case, Frost was compensated for violation of her First Amendment right to free exercise of religion. The case at bar dealt with deprivation of Frost's other constitutional rights. . . . The damages in this case were awarded for deprivation of the constitutional rights proven in this case, without regard to violation of First Amendment rights to free exercise of religion. (Brief of Vicki Frost as Appellee to Hawkins County Board of Education Appeal, and Reply to Appellee's Briefs, U.S. Ct. App., 6th Cir., No. 86-5680/5706, pp. 28, 29).

The District Court dismissed the City of Church Hill and the punitive damage claim against the Board. The jury exonerated Police Chief Ashbrook, Principal Price and Superintendent Snodgrass and returned a verdict of $70,000 against the Board. On appeal the Court of Appeals granted a judgment notwithstanding the verdict in favor of the Board and affirmed dismissal of all other parties. (13a, 14a).

The Court of Appeals found that no evidence was presented from which a reasonable person could find that plaintiff's constitutional rights were violated by the Board of Education. (10a). It also found that the only relevant

policy in the record with regard to the Board was the November 10, 1983 resolution requiring all Hawkins County students to use only those textbooks which the Board had currently approved; and there was no evidence that policy was a proximate cause of any of Mrs. Frost's claimed deprivations. (12a).

No party briefed the issue of whether Petitioner's right to freely exercise her religion was unconstitutionally infringed upon and the Court of Appeals made no mention of free exercise rights.

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ARGUMENT

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. QUESTIONS 1, 3 AND 4 PRESENTED IN THE PETITION FOR CERTIORARI DEAL WITH THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT AND WERE NOT RAISED, PASSED ON, OR PRESERVED IN THE DISTRICT COURT OR THE COURT OF APPEALS AND CANNOT BE DECIDED ON THIS RECORD.

This case does not present the issues which Petitioner maintains. The case does not involve the Free Exercise Clause of the First Amendment. This Court would of necessity have to render an impermissible advisory opinion should it undertake to answer either questions 1, 3 or 4. *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947). Each of those questions deals with potential violation of the Free Exercise Clause, which was not dealt with in the trial court or the Court of Appeals. The issues

urged on this Court were not pled, charged to the jury or brought to the Court of Appeals' attention. The questions should not be considered now. *Springfield v. Kibbe,* 480 U.S. 257 (1987); *Adickes v. Kress & Co.,* 398 U.S. 144, 147, n.2 (1970); *California v. Taylor,* 353 U.S. 553, 557, n.2 (1957).

A. Petitioner made no claim below that her free exercise of religion had been impermissibly burdened.

Neither the Complaint, nor the Pretrial Order, contained any indication that Petitioner claimed that her free exercise of religion had been impermissibly burdened.[3] Mrs. Frost alleged violations of her First Amendment free speech rights and her Fourteenth Amendment rights. She claimed prior restraint on expression of her ideas on the advisability of using the Holt readers in the Hawkins County public schools, denial of physical custody of her daughter without due process, false arrest and imprisonment and malicious prosecution. There was no mention whatsoever of the Free Exercise Clause in the pleadings or pretrial order or in any documents filed by Petitioner in an effort to amend the Pretrial Order (R.28, 36).

B. The jury was not instructed on the issue of violation of the Free Exercise Clause of the First Amendment.

The jury in this case could not have decided any questions pertaining to alleged violation of Mrs. Frost's right to freely exercise her religion because it received no in-

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[3] See Statement of the Case, p. 8, *supra* for plaintiff's claims for relief as stated in the Pretrial Order.

structions on that area of the law. Although the trial judge read the entire First Amendment to the jury, it is obvious that he did so only because plaintiff had alleged violation of her free speech rights.[4]

Petitioner sought no jury charge dealing with the Free Exercise clause of the First Amendment of the United States Constitution and made no objection to the trial court's failure to instruct on the Free Exercise Clause.

C. Petitioner did not brief the issue of impermissible burden of free exercise of religion in the Court of Appeals, her counsel stated she sought no relief under the Free Exercise Clause, and she is estopped to raise that issue.

In her brief in the Court of Appeals Petitioner claimed no error in the trial court's failure to charge on the issue of impermissible burden of free exercise of religion; nor did she complain of the trial court's failure to instruct the jury about or otherwise deal with the issues she now raises in questions 1, 3 and 4 in the Petition. The explanation for Mrs. Frost's failure to brief these issues is obvious—she sought no relief based on the Free Exercise Clause. Her counsel stated clearly that she sought no such relief:

> In the *Mozert* case, Frost was compensated for violations of her First Amendment right to free exercise of religion. The case at bar dealt with deprivation of Frost's other constitutional rights. . . . The damages in this case were awarded for deprivation of the constitutional rights proven in this case, without regard to violation of First Amendment rights to free exercise of religion. (Brief of Vicki Frost as Appellee to

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[4] See respondents Statement of the Case, p. 9, *supra*, for pertinent portion of the jury instructions.

Hawkins County Board of Education Appeal, and Reply to Appellee's Briefs, U.S. Ct. App., 6th Cir., No. 86-5680/5706, pp. 28, 29).

Petitioner is bound by the representations of her counsel in the Court of Appeals and is judicially estopped to seek relief based on the First Amendment right to free exercise of religion. *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982).

D. Facts necessary to decide the questions presented were not developed in the trial court.

Even if the Court were inclined to consider questions 1, 3 and 4 presented in the Petition, the record does not contain the necessary facts. There was no effort by either side to develop facts dealing with the sincerity of plaintiff's religious beliefs, whether those beliefs were burdened, whether there was a compelling state interest which justified the burden and whether plaintiff's beliefs could have been accommodated without compromising compelling state interests. Those questions must be answered in a Free Exercise Clause case.

II. THE ISSUES RAISED IN QUESTIONS 1, 3 AND 4 PRESENTED IN THE PETITION FOR CERTIORARI WERE DECIDED AGAINST PETITIONER BY THE COURT OF APPEALS IN ANOTHER ACTION INVOLVING THE SAME PARTIES AS IN THE ACTION NOW BEFORE THIS COURT AND THIS COURT DENIED CERTIORARI.

Petitioner is seeking to have the Court review questions it declined to consider during its last term in a case with the same parties. She wants a "second bite at the apple" to which she is not entitled.

Mrs. Frost and others of like mind litigated the question of whether the Hawkins County Board of Education's policy of requiring all students to use the Holt readers impermissibly burdened their free exercise of religion in *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd* 827 F.2d 1058 (6th Cir. 1978), *cert. denied*, 108 S. Ct. 1029 (1988). Defendants included the Board, Jean Price and Bill Snodgrass, and the factual background was the same as that of the case now before this Court. An eight day trial was devoted to questions of whether plaintiffs' religious beliefs were burdened, the nature of the State's interest in requiring use of the books, what accommodation could and should be made for plaintiffs, etc. The issues Mrs. Frost now asks this Court to consider were thoroughly developed in *Mozert*, where the Court of Appeals reversed a verdict in Mrs. Frost's favor and this Court elected not to review the case.

Question No. 1 in the Petition for Certiorari in the *Mozert* case reads:

> 1. Does coercing children to read textbooks which violate their religious beliefs burden their free exercise of religion?

Questions 1, 3 and 4 in the petition in this case are simply an elaboration on the question posed in the *Mozert* case and are encompassed in it:

> 1. May a public school refuse to exempt a student who, along with parents, raises sincere religious objections to certain required books in a reading class?
>
> 3. May public schools expel children from all aspects of the public school curriculum, and thereby deny a public benefit, if they and their parents object on

sincere religious grounds to one portion of the school curriculum?

4. Do public schools have a constitutional duty to provide reasonable education alternatives to accommodate the sincere religious objections of a few students and parents to specific curricular materials?

The decision in the *Mozert* case conclusively establishes that Mrs. Frost's free exercise rights were not impermissibly burdened. As far as issues 1, 3 and 4 are concerned the parties in this case are identical to those in the *Mozert* case and the decision of the Court of Appeals in that case is final and constitutes *res judicata* on those questions. Petitioner is estopped to raise the issue of violation of her right to free exercise of religion in this case. *Montana v. United States,* 440 U.S. 147 (1979); *United States v. Munsingwear,* 340 U.S. 36 (1950).

III. QUESTION 2 PRESENTED IN THE PETITION FOR CERTIORARI PRESENTS AN ABSTRACT ISSUE DEPENDENT ON ASSUMED FACTS NOT ESTABLISHED IN THE TRIAL COURT.

Petitioner's Question 2[5] is misleading because it assumes facts which are not presented. There is no evidence that a "public school" (presumably Petitioner meant "a school board") had Mrs. Frost arrested. The Court of Appeals found no evidence the Board caused Mrs. Frost to be arrested. There was no evidence of any action by the Board as an entity except the resolution requiring all students to use the Holt readers and that was found not

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[5] 2. May a public school have a nondisruptive mother arrested on school property and jailed for peacefully stating to school officials her sincere religious objection to certain required books in a reading class and for petitioning for exemption of her daughter from those books?

to be a proximate cause of any deprivation of rights (11a, 12a). The Pretrial Order alleges only Ashbrook, the City of Church Hill and Price arrested Mrs. Frost (or caused her to be arrested).[6]

Even if one assumes there is evidence Mr. Snodgrass or Mrs. Price or Board employees somehow caused Petitioner to be arrested, the Board would not be liable. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). The jury apparently felt Snodgrass and Price were not liable since they were exonerated.

Mrs. Frost was arrested by Church Hill police chief Joe Ashbrook who she called to the school. He had no affiliation with the School Board; and he was also exonerated by the jury.

The essential factual predicate of the question presented—that the School Board had Mrs. Frost arrested and jailed—is missing. Question 2 is therefore merely an abstract or hypothetical question unrelated to the realities of this case and this Court traditionally will not answer such a question.

IV. THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE WHICH PRESENTED NO IMPORTANT QUESTION OF FEDERAL LAW.

This case presents no important unanswered question of federal law. It involved allegations of prior restraint on free speech, false arrest and imprisonment and malicious prosecution; and basically involved a determination of disputed facts. The jury found the facts against Mrs.

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[6] See Statement of the Case, p. 8, *supra*.

Frost as to all defendants except the City of Church Hill and the School Board and there was insufficient evidence to support a verdict against them. The Court of Appeals correctly decided the appeal.

None of the claimed questions of "extraordinary import" which Petitioner accuses the Court of Appeals of ignoring were present in this case. All of those questions involve the Free Exercise Clause which was not pled, proved or even discussed in either the trial court or the Court of Appeals.

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CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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